IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9371 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SUDA SOMA RABARI

Versus

STATE OF GUJARAT

Appearance:

MS JAYSHREE C BHATT for Petitioner

Mr. U.R. Bhatt, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 30/04/98

ORAL JUDGEMENT

The petitioner, who is detained passing the order of detention dated 4th November 1997 under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act, (for short `the Act') by this application under Article 226 of the Constitution of India, challenges the legality and validity of that order.

2. The facts which led the petitioner to prefer this application may in brief be stated. About six complaints

came to be lodged against him with Bantva police station. In four complaints it is alleged that the petiitoner was found in possession of liquor in huge quantity without any pass or permit and he thereby committed the offences punishable under Section 66(1)(b) and 65 (e) and 81 of the Bombay Prohibition Act. In rest of the two complaints as alleged the petitioners committed the offences punishable under Section 352, 504, 506 Part 2, 326, 143, 147, 148 read with Section 149 of the Indian Penal Coded and Section 135 of the Bombay Police Act. Thus when in succession the complaints were being lodged against the petitioner, the District Magistrate at Junagadh thought it fit to inquire into the matter. After inquisition he could see that the petitioner was a dangerous person, i.e., a tartar and a decimator. He was by different types of subversive and nefarious activities disturbing the public order and terrorising the people. He used to force the people to help him or harbour him or provide the vehicles and those who refused had to face the dire consequences. No one was therefore willing to lodge the complaint. Every one under the fear of violence used to keep his lips tight, as a result the petitioner got the free hand for carrying out his activities and he became more and more wicked. He was keeping a lethal weapon. At the point of those weapon he was wielding the sceptre. The District Magistrate then preferred to have some statements but feeling insecured and worrying about his safety no one came forward to give statement. After considerable persuasion and when assurance was given that the facts disclosing their identity would be kept secret some of the persons showed their willingness to give statements. When the District Magistrate perused the statements recorded he was shocked to know that the petitioner was having a wide network for the purpose of carrying on his liquor business and doing subversive activities. With a view to make the people feel free he thought it wise to take stern action against the petitioner. After cogitation he realised that any action if taken under the general law sounding dull would yield no result. He therefore thought it fit to pass the order of detention being the only way out, passed the order in time and in pursuance to which the petitioner came to be arrested. At present he is under detention.

3. The petitioner has challenged the legality and validity of the order of detention on several grounds, but at the time of submission after query was made the learned advocate for the petitioner tapered off her submissions confining to the only point namely the exercise of privilege under Section 9(2) of the Act. According to her without any just cause the particulars

about the witnesses were not furnished to the petitioner. No doubt, it was open to the detaining authority not to disclose certain particulars in public interest but nothing from the order of detention appears justifying the exercise of privilege. Had the particulars been supplied, the petitioner could have pointed out whether the statements recorded were reliable, but for want of the particulars his right to make effective representation was jeopardised.

4. In reply to such contention, Mr. U.R. Bhatt, the learned APP submitted that after careful consideration of all relevant materials incidental to the petitioner and other records that was placed before the detaining authority privilege was exercised because it was found that if the particulars about the witnesses if disclosed, possibility of retaliatory action from the petitioner could not be denied. Just to have the order of his choice the petitioner has approached this court. He therefore urged to dismiss the petition.

5. When both have confined to the only point namely the exercise of privilege, it would be better if the law about non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a

wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority was required to file the affidavit and satisfy the court that it was in the public interest namely to protect the lives of the witnesses certain particulars about those witnesses were required to be kept secret. It is pertinent to note that in this case affidavit justifying the circumstances for the exercise of the privilege under Section 9(2) of the Act is not filed. When that is so, it should be assumed that without any just cause the particulars were suppressed. As the particulars were not given, naturally the petitioner could not know what

defence was available to him, what were the reasons to state against him and whether in fact those witnesses really stated so or whether they were really in existence. Thus the right to make effective representation is jeopardised. Further, for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind qua the privilege. Thus the requirements of Section 9(2) of the Act are not satisfied and the privilege exercised cannot be said to be just and proper. The order of detention passed is, therefore, bad in law and continued detention is arbitrary and illegal. The same is therefore liable to be quashed.

7. For the aforesaid reasons, this petition is allowed. The order of detention dated 4-11-1997, is quashed and set aside being unconstitutional and illegal and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

8. It is submitted that the petitioner is transferred to Rajkot jail. Hence, writ be sent to the Jail Superintendent at Rajkot.

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(rmr).